

# *Fordham Environmental Law Review*

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*Volume 3, Number 1*

2011

*Article 4*

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## The Role of Insurance in Environmental Liability

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# THE ROLE OF INSURANCE IN ENVIRONMENTAL LIABILITY

JEFFREY T. KNEBEL \*

## INTRODUCTION

IN recent years, individuals, companies, corporations and even financial institutions and cities, connected with the disposal or generation of hazardous substances, have faced unprecedented liability for pollution. The passage of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980,<sup>1</sup> commonly known as the Superfund statute, has added a new dimension to the scope of business risks associated with owning property or operating a facility where hazardous substances have been released. In addition to property damage and personal injury suits from third parties, operators and generators are now liable for the cleanup costs of Superfund sites.<sup>2</sup> With this increased exposure, many companies have been demanding that their liability insurers indemnify them for all expenses they incur in cleaning up contaminated property.<sup>3</sup>

The majority of these indemnity claims are based on Comprehensive (or Commercial) General Liability (CGL) policies carried by most companies. CGL policies have historically been identical to or based on policy terms in form contracts drafted by the Insurance Services Office (ISO).<sup>4</sup> However, the lack of uniformity in court decisions interpreting

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1. 42 U.S.C. § § 9601-75 (1988).

2. In general, CERCLA imposes liability, for the releases or threatened releases of "hazardous substances" from a facility, on present owners and operators of the facility and those at the time of disposal, as well as persons who arranged for the transport or disposal of any hazardous substances at the site, and persons who transported any such substances to the facility. The Superfund Act provides a wide range of liabilities for responsible parties, including any removal or remedial costs incurred by the government or private parties, any damages to natural resources and any costs associated with injunctive relief ordered by the government. 42 U.S.C. § 9607 (1988). Although the majority of the insurance coverage cases for environmental liabilities center around indemnification for Superfund cleanups, parties also seek coverage for costs incurred under other statutes such as the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § § 6901-92 (1988), the Clean Air Act Amendments of 1977, 42 U.S.C. § § 7401-7642 (1988), amended 1990, and the Clean Water Act of 1977, 33 U.S.C. § § 1251-1387 (1988).

3. In a February 5, 1991 report, the Congressional General Accounting Office (GAO) concluded that insurance companies will continue to face substantial claim payments in the future for hazardous waste cleanups. The report is a follow-up to GAO testimony at the September 27, 1990 hearing before the Policy Research and Insurance Subcommittee of the House Banking, Finance and Urban Affairs Committee. Although the GAO report is based on rather scant data (i.e., only nine insurance companies responded to the survey), GAO estimates a \$26 billion to \$200 billion potential loss for the property and casualty insurance industry due to claims based on environmental damage.

4. The ISO basically functions as an advisory organization and statistical agent for

whether liability for pollution is covered under CGL policy has troubled both insurers and those insured.

The federal courts have not been able to effectuate a uniform approach under CERCLA because the determinative issues are governed by the law of the state with the most significant relationship to the negotiation of the insurance contract terms. Using the law of the relevant state to interpret contractual agreements has enabled courts to interpret nearly identical language to reach polar outcomes. The courts, by applying different rules of interpretation and giving varying degrees of priority to different policy considerations, arrive at opposite conclusions about whether pollution coverage exists under a CGL policy. This paper discusses the various terms that are typically in dispute, the rules of interpretation and policy considerations cited by various courts when determining this issue, and suggested methods for interpreting and analyzing the question of coverage for environmental liabilities.<sup>5</sup>

### I. TROUBLING TERMS IN THE CGL

The terms in the typical CGL policy that courts usually must address in deciding whether pollution coverage is available are "occurrence," "damages," "property damage," and "sudden and accidental." The first three terms are usually contained in the section of the CGL policy which sets out the scope of insurance coverage. For example, the text of the coverage provision in a standard CGL policy states that the insurer, "will pay those sums that the insured shall become legally obligated to pay as 'damages' because of 'bodily injury' or 'property damage' to which this insurance applies caused by an 'occurrence.'"<sup>6</sup>

As an initial matter in construing a CGL policy, a court must determine whether the environmental liabilities were caused by an occurrence. Another critical inquiry in the environmental context is whether liabilities, such as injunctions and response costs under CERCLA, are covered damages caused by property damage. The standard CGL policy usually will not specifically define the term "damages." However, property damage is typically defined as "physical injury to tangible property, including all resulting loss of use of that property."<sup>7</sup>

The "sudden and accidental" language is typically found in the pollution exclusion clause, a provision included only in the more recent CGL policies. The pollution exclusion clause normally is found in the section

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the insurance industry. It was initially founded to provide policy forms and statistical and actuarial information to its members, which consist of property and casualty liability insurance companies.

5. The opinions and conclusions set forth in this paper are the personal views of the author. None of the matters set forth herein are represented to be the views of the author's past, present or future clients or colleagues.

6. Commercial General Liability Coverage Form at 1 (Insurance Services Office, Inc., 1984).

7. *Id.* at 9.

of the policy that enumerates those instances in which the CGL policy will not provide indemnity. A standard pollution exclusion clause states that coverage:

does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkaloids, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is *sudden and accidental*. (emphasis added)<sup>8</sup>

Therefore, the exclusion clause will bar coverage for damages from pollution releases unless the discharge or damages are both sudden and accidental.

## II. HAS THERE BEEN AN "OCCURRENCE"?

The standard CGL policy, which is a third party liability policy, protects the insured from claims arising from damages to property belonging to someone other than the insured which are caused by an "occurrence." Before 1966, coverage under a CGL policy was triggered by an "accident," which was undefined in the policy. This fact usually led to litigation over whether an "accident" involved an event that occurred suddenly,<sup>9</sup> or whether it also included events occurring over a longer period of time.<sup>10</sup> After 1966, the term "occurrence" replaced "accident" in the standard CGL policy and was defined as: "an accident, including continuous or repeated injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage *neither expected nor intended from the standpoint of the insured*."<sup>11</sup>

Although some courts have determined that there is no "occurrence" in situations involving environmental damages,<sup>12</sup> insureds facing such liabilities do not usually encounter problems in proving the "accident"

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8. *Id.* See also E. Joshua Rosenkranz, Note, *The Pollution Exclusion Clause Through the Looking Glass*, 74 GEO. L. J. 1237, 1251 (1986).

9. For an example, see *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 206 N.W.2d 632, 637 (Neb. 1973).

10. See *American Casualty Co. v. Minnesota Farm Bureau Serv. Co.*, 270 F.2d 686, 690 (8th Cir. 1959).

11. The development of the concept of an "occurrence" in the CGL policy was a compromise between the conflicting positions of insurance companies and those insured. Under the pre-1966 "accident" policy, those insured argued and many courts accepted the idea that coverage should exist for injuries that were unexpected or unintended from the viewpoint of the insured, even if such injuries occurred over long periods of time. Conversely, insurers argued that an "accident" must be an identifiable event which occurs in a relatively brief period of time. To accommodate both of these theories, the insurance industry developed the "occurrence" policy.

12. For example, in *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986) (applying Maryland law), the Fourth Circuit held that there was no "occurrence" during the policy period. However, the case involved somewhat unique factual circumstances since the policy was only in effect during 1969, and the insured's complaint did not indicate any damage to the government plaintiffs before 1981 or any release discovery

portion of the "occurrence" definition if the factual circumstances support such a conclusion. However, there has been a great deal of controversy over the language within the "occurrence" definition of "neither expected nor intended from the standpoint of the insured." In interpreting this clause and the existence of an occurrence in general, the following major issues must be addressed by the court: (1) is it the resulting environmental damages or the actual event which must not be expected nor intended by the insured?; (2) if the answer to the above question is the resulting damages, what test should the court apply to determine whether an insured "expected or intended" such damages or injuries?; and (3) what are the relevant factors in determining the timing of an occurrence?

#### A. *Expected or Intended Discharge or Injuries?*

The question of whether an occurrence is expected or intended depends upon the particular factual circumstances of the case. Insurers have generally argued that there should be no coverage as a matter of law when the insured discharges waste as a part of its routine business (i.e., the discharge is known, routine and repeated). Therefore, insurance companies argue that it is the discharge which must be neither expected nor intended by the insured for there to be coverage. On the other hand, insureds argue that it is the resulting damage or injuries which they must neither expect nor intend. According to the insureds, an occurrence should be covered as long as the insured does not know as a practical certainty that damage will occur from a discharge.

Generally, most courts have accepted the insureds' theory in holding that the relevant factor in determining the existence of an occurrence is whether the *damage* was intended or expected.<sup>13</sup> In taking this position, some courts have held that unexpected or unintended damages resulting from even intentional conduct on the part of the insured are covered under the typical CGL policy.<sup>14</sup> Other courts have taken a contrary position by focusing on whether the action (i.e., discharge) of the insured was expected or intended, rather than concentrating on the harm itself.<sup>15</sup>

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prior to 1981. *See also* Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 752 F. Supp. 812 (E.D. Mich. 1990).

13. *See, e.g.,* City of Johnstown v. Bankers Standard Ins. Co., 877 F.2d 1146, 1150 (2d Cir. 1989) (New York); Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293, 1317-18 (5th Cir. 1982) (Louisiana); City of Carter Lake v. Aetna Casualty & Sur. Co., 604 F.2d 1052, 1056 (8th Cir. 1979) (Iowa); American Universal Ins. Co. v. White-wood Custom Treaters, Inc., 707 F. Supp. 1140, 1143 (D.S.D. 1989); International Minerals and Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758, 765 (Ill. App. 1988).

14. *See* James Graham Brown Found., Inc. v. St. Paul Fire & Marine Ins. Co., 814 S.W.2d 273, 278 (Ky. 1991) (injuries are covered even though the activity which produced the alleged result is fully intended and the residual effects fully known, as long as the damage itself is completely unexpected and unintended); *International Minerals*, 522 N.E.2d at 765; Jackson Township Mun. Utils. Auth. v. Hartford Accident & Indem. Co., 451 A.2d 990, 994 (N.J. Super. Ct. Law Div. 1982).

15. *See, e.g.,* Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d

In most cases, the insured will prevail on this issue, even if the insured engaged in intentional discharges of contaminants that were in compliance with any applicable regulations and the best management practices at the time of the discharge, provided that the damages were neither expected nor intended. Damages resulting from intentional discharges which are not in compliance with applicable regulations will most likely not be covered since they will probably be seen as expected or intended.

### B. *Interpretation of "Expected" or "Intended"*

The next inquiry is the meaning of the requirement in the CGL policy that the event or damage must be "expected or intended" from the insureds' viewpoint. Some key issues often raised in this area are the state of mind of the insured and the degree of foreseeability necessary to implement the "expected or intended" clause. A minority position among the courts, advocated by insureds, involves a subjective test of whether the insured actually intended the damages or should have expected the resulting damage with a substantial certainty.<sup>16</sup> However, several courts have applied an objective test, holding that the event/harm is expected or intended if the result is "reasonably foreseeable."<sup>17</sup> Other courts have held that there is no occurrence if the insured knew, or should have known that there was a substantial probability that the resulting damages would follow.<sup>18</sup> Although this middle of the road approach seems to be the most common among courts, other tribunals hold that any damages resulting from regularly conducted business activities are expected or intended by the insured and therefore are not covered.<sup>19</sup>

### C. *Timing and Triggering of Coverage*

Once an insured adequately proves the existence of an occurrence, the court must apply state law to determine the actual time of the occurrence under the policy. This determination is extremely important for the purpose of determining whether the occurrence happened during the policy

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30, 33 (1st Cir. 1984) (New Hampshire) (pollution occurring as part of regular business activity considered to be expected or intended property damage); *Ashland Oil, Inc.*, 678 F.2d at 1317-18 (applying Louisiana law); *Detrex Chem. Indus., v. Employers Ins. of Wausau*, 681 F. Supp. 438, 457 (N.D. Ohio 1987); *American States Ins. Co. v. Maryland Casualty Co.*, 587 F. Supp. 1549, 1553-54 (E.D. Mich. 1984) (no coverage when insured engages in intentional and continuous dumping).

16. See, e.g., *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989) (New York); *Honeycomb Sys., Inc. v. Admiral Ins. Co.*, 567 F. Supp. 1400, 1407 (D. Me. 1983).

17. *Mutual Serv. Casualty Ins. Co. v. Country Life Ins. Co.*, 859 F.2d 548, 552 (7th Cir. 1988) (Illinois) (coverage denied if insured reasonably anticipated results); *City of Aurora v. Trinity Universal Ins. Co.*, 326 F.2d 905, 906 (10th Cir. 1964) (Colorado).

18. *Auto-Owners Ins. Co. v. Jensen*, 667 F.2d 714, 719-20 (8th Cir. 1981) (Minnesota); *City of Carter Lake v. Aetna Casualty & Sur. Co.*, 604 F.2d 1052, 1058-59 (8th Cir. 1979) (Iowa); *Summers v. Harris*, 573 F.2d 869, 872 (5th Cir. 1978); see *New Castle County v. Hartford Accident and Indem. Co.*, 685 F. Supp. 1321, 1330-31 (D. Del. 1988).

19. See, e.g., *Great Lakes*, 727 F.2d at 34.

period. Most courts hold that the time of an occurrence is when "bodily injury" or "property damage" takes place,<sup>20</sup> as opposed to when the insured committed the negligent or wrongful act.<sup>21</sup> However, a critical and difficult issue involves when such damage or injury actually occurs.

Due to the unique nature of environmental contamination, the actual date of an occurrence may be difficult to determine because discharges of hazardous waste often occur gradually and the manifestation of the injury may be delayed. However, courts have developed various theories to pinpoint the date of an occurrence, including the following: (1) manifestation or discovery; (2) exposure; (3) wrongful act; (4) injury-in-fact; and (5) continuous trigger. Although the court decisions follow no consistent pattern, the manifestation or discovery theory is perhaps the most widely accepted. Under that theory, an occurrence takes place on the date the injury is or should have been discovered.<sup>22</sup> When applying the exposure and wrongful act theories, coverage is triggered on the date of the commencement of the damage. In cases of property damage from releases of hazardous waste under the exposure and wrongful act theories, the occurrence is on the date of the release.<sup>23</sup> Under the injury-in-fact method, coverage begins on the date an actual injury exists, regardless of the time of exposure or manifestation.<sup>24</sup>

Finally, an approach typically advocated by insureds is the continuous or multiple trigger theory. This method, which is a hybrid of the "manifestation" and "exposure" approaches, states that the occurrence may happen anytime in the continuous period from the date of exposure to the date of manifestation.<sup>25</sup> Therefore, the multiple trigger approach provides a very broad time frame for the date of an occurrence, since any insurance policy in effect at the time of the period of exposure or manifestation will cover the damage. In complex cases where damages have occurred over a long period of time, many courts have chosen the multiple trigger approach to maximize coverage on the basis of a fact-specific

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20. See, e.g., *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d at 1325, 1327 (4th Cir. 1986); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 195 (W.D. Mo. 1986).

21. See, e.g., *Eagle-Picher Indus. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983) (asbestos); *Acushnet River v. New Bedford Harbor*, 725 F. Supp. 1264, 1274-75 (D. Mass. 1989).

22. See *Eagle-Picher Indus.*, 682 F.2d at 25; *American Home Assurance Co. v. Libby-Owens-Ford Co.*, 786 F.2d 22, 30 (1st Cir. 1986).

23. See *Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co.*, 811 F.2d 1180 (8th Cir. 1987), *rev'd on other grounds*, 842 F.2d 977 (8th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 821 (1989) (Missouri); *Acushnet River*, 725 F. Supp. at 1274; *Detrex Chem. Indus. v. Employers Ins. of Wausau*, 681 F. Supp. 438, 456 (N.D. Ohio 1987).

24. See *Triangle Publications v. Liberty Mut. Ins. Co.*, 703 F. Supp. 367, 370 (E.D. Pa. 1989); *Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, 654 F. Supp. 1334, 1358 (D.D.C. 1986).

25. See *New Castle County v. Continental Casualty Co.*, 725 F. Supp. 800, 812 (D. Del. 1989); *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 152, 197 (W.D. Mo. 1986); *Gottlieb v. Newark Ins. Co.*, 570 A.2d 443, 446 (N.J. Super. Ct. App. Div. 1990).

inquiry.<sup>26</sup>

### III. ENVIRONMENTAL LIABILITIES AS "DAMAGES"

Once a court has determined there has been a covered "occurrence" within the time period of the policy, the court must construe the damages provision of the policy. In the typical case construing insurance coverage for liabilities relating to environmental contamination, a court must determine whether "property damage" has occurred and whether response costs or other measures associated with the cleanup of releases of waste are "damages" within the context of the CGL policy.

#### A. "Property Damage" in the Insurance Contract

One of the earliest federal appellate court cases denying coverage for Superfund response costs involved the interpretation of the definition of property damage. In *Mraz v. Canadian Universal Insurance Co.*,<sup>27</sup> the Environmental Protection Agency (EPA) and the State of Maryland had investigated and paid for the cleanup of 1300 barrels of chemical waste in a clay-lined pit known as the Leslie Superfund Site. Those two entities later filed suit against Mraz who had disposed of toxic waste at the site to recover their cleanup costs. Mraz brought an action for declaratory judgment against Canadian Universal Insurance to establish the company's duty to defend and indemnify him against the EPA suit.

Applying Maryland law, the Fourth Circuit Court of Appeals found for Canadian Universal on several grounds, one of which was its interpretation of property damage.<sup>28</sup> The court interpreted CERCLA to impose liability on responsible parties for all costs of removal or remedial action incurred by the federal or state government, for other costs of response incurred by any other people, and for damages for injury to natural resources at a Superfund site.<sup>29</sup> However, the definition of natural resources is limited to resources owned, managed or held in trust by the United States or another governmental unit.<sup>30</sup> Thus, even though damage to the property may have occurred at the Leslie Site, the literal terms of the statute provided that this was not damage to the natural resources (i.e., the property) because the U.S. government had not claimed interest in the property. Therefore, the court found that the response costs under these circumstances were economic losses rather than covered property damages. As the policy provided coverage for property damage and bodily injury only, Canadian Universal was not required to

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26. See, e.g., *Michigan Chems. Corp. v. American Home Assurance Co.*, 728 F.2d 374, 383 (6th Cir. 1984); *Scientific Control Corp. v. RLI Ins. Co.*, CA No. 87-4438 (D.N.J. 1990); *New Castle*, 725 F. Supp. at 812-13; *Gottlieb*, 570 A.2d at 446-47.

27. 804 F.2d 1325 (4th Cir. 1986).

28. *Id.* at 1329.

29. *Id.* at 1328-29.

30. 42 U.S.C. § 9601(16) (1988).



indemnify Mraz for the response costs.<sup>31</sup>

Many commentators feel that the *Mraz* decision does not properly interpret the coverage provisions in the CGL policy. Under the terms of the usual CGL policy, the insurer does not promise to pay for property damage, but rather for amounts that the insured is obligated to pay as damages *because* of property damage. Although there was no dispute in *Mraz* that damages in the form of response costs had occurred at the Leslie Site, the court stated that the policy obligated Canadian Universal to pay only for the actual property damage.<sup>32</sup> Most courts do not follow this distinction. Rather, in interpreting coverage for response costs, most tribunals focus not on whether cleanup costs are "property damage," but on whether cleanup costs are "damages" within the scope of the insurance contract.

### B. Interpreting the Term "Damages"

Perhaps the most widely disputed issue in coverage cases is whether response costs under CERCLA and related environmental statutes constitute damages under the terms of CGL policies. However, the judicial need to define "damages" is not a new problem created by CERCLA liability. Before the passage of CERCLA in 1980, this issue was often addressed under state laws regulating environmental cleanup.

For example, in *Lansco, Inc. v. Department of Environmental Protection*,<sup>33</sup> a case involving the discharge of oil into a river, the Superior Court of New Jersey rejected the arguments that property damage meant only measurable damage to physical property, and that response costs for environmental cleanups were not legally imposed obligations on an insured.<sup>34</sup> In examining a statute that measured damages by the cost of eliminating the harmful substances, the *Lansco* court determined that the damages involved consist of the costs of cleanup, because this was the amount that Lansco was legally obligated to pay.<sup>35</sup> Other courts have taken a contrary position, denying coverage for costs incurred under pre-Superfund remedies such as court orders, that required parties to take some action to remove environmental conditions. Such actions constitute equitable relief and therefore are not damages.<sup>36</sup>

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31. *Mraz*, 804 F.2d at 1328-29.

32. *Id.*

33. 350 A.2d 520 (N.J. Super. Ct. 1975).

34. *Id.* at 524.

35. *Id.* at 525 (construing N.J. STAT. ANN. 58:10-23.7, repealed by L. 1976, c. 141, § 28).

36. See, e.g., *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) (Florida); *Desrochers v. New York Casualty Co.*, 106 A.2d 196, 199 (N.H. 1954) (costs of complying with court-injunction to remove obstruction on land causing adjacent property to flood was not "damages" because it constituted equitable relief). But see *Doyle v. Allstate Ins. Co.*, 136 N.E.2d 484, 486-87 (N.Y. 1956) (damages could have been awarded had the plaintiffs established their right to equitable relief).

### 1. CERCLA Cleanup Costs Equal "Damages"

State and federal courts applying state law are split over whether Superfund cleanup costs are damages under the terms of a CGL policy. Of the few state supreme courts that have addressed the issue,<sup>37</sup> the majority of those courts, such as North Carolina, Washington, Massachusetts, Minnesota, and California, have ruled that CERCLA response costs are covered "damages" under the terms of a CGL policy. In a November 1990 decision in *AIU Insurance Co. v. Superior Court of Santa Clara County*,<sup>38</sup> the California Supreme Court continued a majority trend among the state supreme courts in holding that environmental cleanup costs incurred as a result of CERCLA and similar state statutes are "damages because of property damage" under CGL policies.<sup>39</sup>

In *AIU*, the California court held in favor of the insured for three main reasons. First, the court rejected the equitable/legal distinction for CERCLA remedies adopted by many courts that had held that damages included only "legal" damages. In interpreting "legally obligated to pay," the court held that as a matter of plain meaning, the above term involved injunctive relief and recovery of response costs under CERCLA.<sup>40</sup> Second, the court found that CERCLA cleanup costs fell within the plain, dictionary meaning of damages which included "compensation, in money, recovered by a party for 'loss' or 'detriment' it ha[d] suffered through the acts of another."<sup>41</sup> Under this definition, the court included the reimbursement of response costs incurred by the government because a release of hazardous waste causes "detriment" to government interests (i.e., out-of-pocket losses) and reimbursement of such costs is compensation in money.<sup>42</sup> Additionally, the court rejected the insurer's argument that CERCLA distinguished between response costs and damages, finding that the intent of the parties, which should be the primary focus, "could not possibly have been influenced by the niceties of statutory language adopted many years after the policies were drafted."<sup>43</sup> Finally, the court continued a nearly unanimous position of courts nationwide in holding that cleanup costs were incurred "because of property damage."<sup>44</sup>

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37. *AIU Ins. Co. v. Superior Court of Santa Clara County*, 799 P.2d 1253 (Cal. 1990); *Lido Co. of New England v. Fireman's Fund Ins. Co.*, 574 A.2d 299 (Me. 1990); *C.D. Spangler Constr. Co. v. Industrial Crankshaft and Eng'g Co.*, 388 S.E.2d 557 (N.C. 1990); *Boeing Co. v. Aetna Casualty & Sur. Co.*, 784 P.2d 507 (Wash. 1990) (en banc); *Hazen Paper Co. v. U.S. Fidelity & Guar. Co.*, 555 N.E.2d 576 (Mass. 1990); *Minnesota Mining & Mfg. Co. v. Travelers Indemnity Co.*, 457 N.W.2d 175 (Minn. 1990).

38. 799 P.2d at 1276.

39. *Id.*

40. *Id.* at 1266.

41. *Id.* at 1267.

42. *AIU Ins. Co.*, 799 P.2d at 1269-70.

43. *Id.* at 1266-67.

44. *Id.* at 1279. See also *Avondale Indus. v. Travelers Indem. Co.*, 887 F.2d 1200 (2d Cir. 1989) (New York), *reh'g denied*, 894 F.2d 498 (2d Cir.), *cert. denied*, 110 S.Ct. 2588 (1990); *United States Aviex Co. v. Travelers Ins. Co.*, 336 N.W.2d 838, 843 (Mich. Ct.

As further rationale for holding that CERCLA response costs are damages within a CGL policy, the *AIU* court noted that ambiguities should be construed in favor of the insured. In finding for the insured, the court rejected the insurer's argument that the policy holder, as a sophisticated purchaser of insurance with substantial bargaining power, should not benefit from settled rules of contract interpretation. Instead, the court found that the sole relevant inquiry involved the reasonable expectations of the insured, and that since the policies at issue were standard form CGL policies, any "negotiations" had no bearing on the interpretation of the contract. Additionally, the court tended to favor a broad interpretation of the environmental policy by holding that liabilities under CERCLA, although not contemplated at the time of the formation of many insurance contracts, were still covered damages. The court held this because new forms of liability that were court-made or legislative in nature were possible risks which the insured would have reasonably expected to be covered under the relevant policy.<sup>45</sup>

The *AIU* decision discusses many of the issues and conclusions typically contained in decisions holding that response costs are damages under a CGL policy. Consistent with this theory, many other courts have held that CERCLA cleanup costs are within the ambit of damages under the typical CGL policy. In perhaps the leading federal case reaching this result, *Avondale Industries v. Traveler's Indemnity Co.*,<sup>46</sup> the Second Circuit interpreted the CGL policy as an ordinary businessperson would. According to the *Avondale* court, under New York law, a reasonable insured policyholder should not be expected to be aware of and understand the legal/equitable distinction on which some courts rely to find that CERCLA costs are equitable remedies and therefore not damages.<sup>47</sup>

Those courts that include response costs within the definition of damages and ignore the legal/equitable distinction often cite the early Superfund case of *United States Aviex v. Travelers Insurance Co.*<sup>48</sup> *Aviex* involved an action in which the State of Michigan sought an injunction to remedy groundwater contamination. The insurance companies argued that the phrase "shall become obligated to pay by reason of liability im-

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App. 1983); *Ryan, Klimek, Ryan Partnership v. Royal Ins. Co.*, 728 F. Supp. 862 (D.R.I. 1990); *National Indem. Co. v. United States Pollution Control, Inc.*, 717 F. Supp. 765, 767 (W.D. Okla. 1989); *Dayton Indep. School Dist. v. National Gypsum Co.*, 682 F. Supp. 1403, 1407-08 (E.D. Tex. 1988), *rev'd on jurisdictional grounds*, 896 F.2d 865 (5th Cir. 1990); *Centennial Ins. Co. v. Lumbermen's Mut. Casualty Co.*, 677 F. Supp. 342, 350 (E.D. Pa. 1987); *Township of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394, 398-400 (D.N.J. 1987); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 193-94 (W.D. Mo. 1986). *Cf.* *National Grange Mut. Ins. Co. v. Continental Casualty Ins. Co.*, 650 F. Supp. 1404 (S.D.N.Y. 1986).

45. *AIU Ins. Co.*, 799 P.2d at 1264-66.

46. 887 F.2d 1200.

47. *Id.* at 1207; *see also* *New Castle County v. Hartford Accident and Indem. Co.*, 933 F.2d 1162 (3d Cir. 1990) (common, everyday meaning of the word "damages" encompasses liabilities arising from both actions at law and at equity).

48. 336 N.W.2d 838 (Mich. App. 1983).

posed by law" referred only to legal claims such as monetary damages for injury to or destruction of property. Rejecting this interpretation as too narrow, the court found that if the state had sued in court for traditional damages of cleanup costs, the insurance company would have been obligated to pay.<sup>49</sup> In holding that the action was covered damages, the Michigan Court of Appeals further stated that it was "merely fortuitous" that the state chose an equitable injunction to order the plaintiff to remedy the problem. In *Aviex*, damages were measured by the costs to restore the water to its original state.<sup>50</sup> This analysis and measure of damages has been followed by several federal district courts in Superfund related actions for response costs.<sup>51</sup>

## 2. Response Costs Are Not Damages

Interestingly, the majority of the federal appellate courts that have addressed this issue have generally ruled that damages only flow from legal actions and that insurance policies do not provide indemnity for equitable relief, injunctions or restitution. For example, the Fourth Circuit in *Mraz* was more concerned with the government's interest in the recovery of property damage than whether response costs are damages within the meaning of the insurance policy.<sup>52</sup> The Fourth Circuit also addressed the classification of response costs in *Maryland Casualty Co. v. Armco, Inc.*<sup>53</sup> There, it held that according to Maryland law, a claim seeking compliance with federal directives in the form of injunctions or restitution of cleanup costs is not a claim for damages within the meaning of the insurance policy. While noting that insurance contracts are ordinarily construed to favor the layman or insured, the *Armco* court stated that the term "damages" should be construed by its "narrow, technical definition."<sup>54</sup> Although the policy in *Armco* promised to indemnify the insured for all sums they become "obligated to pay as damages," the court noted that interpreting damages as *any* sum which the insured is obligated to pay would violate the rule of interpretation which states that courts must always attempt to give meaning to each word of a contract.<sup>55</sup>

The court reached this conclusion by attacking the logic of the Michigan court in *Aviex*. First, the Fourth Circuit did not agree with the *Aviex*

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49. *Id.* at 843.

50. *See id.* at 842-43.

51. *See* *Boeing Co. v. Aetna Casualty & Sur. Co.*, 784 P.2d 507 (Wash. 1990) (answering certified question from U.S. District Court); *Federal Ins. Co. v. Susquehanna Broadcasting Co.*, 727 F. Supp. 169, 174 (M.D. Pa. 1989) (limits maximum amount of response costs recoverable to the total value of the damaged property); *Chesapeake Utils. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 558-61 (D. Del. 1989); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 193-97 (W.D. Mo. 1986).

52. *See* *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1326, 1326 (4th Cir. 1986).

53. 822 F.2d 1348, 1352-54 (4th Cir. 1987).

54. *Id.* at 1352.

55. *See id.* at 1352-53. *But see* *Utica Mut. Ins. Co. v. Bausch & Lomb, Inc.*, No. 87-CG-4860 (Baltimore Cty. Cir. Ct. filed March 19, 1991) (standard CGL policy provides coverage for the cost of cleaning up environmental contamination).

court that the costs of damages would be equal to the costs of restoring the property. The Fourth Circuit believed that property damage claims should be capped at the value of the property, while cleanup costs could well exceed the value of the property because such costs often go beyond restorative efforts and become preventative safety measures.<sup>56</sup> Insurance contracts, the court reasoned, are meant to indemnify for the quantifiable loss to tangible property and not for *any* safety measures the government deems necessary.<sup>57</sup>

A similar conclusion was reached by the Eighth Circuit in *Continental Insurance Co. v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO)*.<sup>58</sup> The NEPACCO court, applying Missouri law, stated that the word "damages" is unambiguous in its insurance context and refers only to legal damages.<sup>59</sup> The basis for the court's conclusion was primarily the fact that the Superfund legislation differentiates between cleanup costs and damages to resources.<sup>60</sup> The court reasoned that this variance indicates that the term damages has a separate meaning in the environmental response context.<sup>61</sup> As an example that some courts still apply this reasoning, the Maine Supreme Court recently relied on NEPACCO and *Armco* in ruling that an insurance company cannot be liable for remedial costs incurred by their insured for a state-ordered cleanup.<sup>62</sup>

#### IV. THE MEANING OF "SUDDEN AND ACCIDENTAL"

Most CGL policies issued after 1970 include a further attempt to limit coverage for environmental losses through use of the pollution exclusion clause. This eliminates coverage for bodily injury or property damage resulting from a wide range of pollution releases. However, most pollution exclusion clauses provide that the exception does not apply if the discharge is "sudden and accidental." As more insureds have sought

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56. See *Maryland Casualty Co. v. Armoline*, 822 F.2d 1348, 1353; *Federal Ins. v. Susquehanna Broadcasting*, 727 F. Supp. 169, 174 (M.D. Pa. 1989) (limiting the amount recoverable as "damages" to the pre-loss value of the contaminated property). Since all remedial costs are still recoverable, this could lead to logically inconsistent situations where indivisible items of response costs are arbitrarily split into categories of "damages" and "economic losses." See *id.*

57. *Id.* at 169.

58. 842 F.2d 977, 985 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988); see also *Grisham v. Commercial Union Ins. Co.*, No. 89-1481 (8th Cir. filed March 8, 1991) (applying Arkansas law). In *Grisham*, the plaintiff had used a 20-acre site to treat fenceposts and other lumber products between 1984 and 1985, pumping waste water from the wood treatment procedure into the ground and spreading it around the plant area for weed and dust control. The court reaffirmed its ruling in the NEPACCO case, holding that cleanup costs do not constitute damages within the meaning of the insurance policies. *Id.*

59. NEPACCO, 842 F.2d at 986.

60. 42 U.S.C. § 9607(a) (1988).

61. NEPACCO, 842 F.2d at 986.

62. *Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 18-19 (Me. 1990).

coverage for liability stemming from gradual leakage or regular discharges, the meaning of this phrase has been widely litigated.

Judges and attorneys urge interpretation of these terms on two basic lines. Those favoring the insured argue that the word "sudden" is ambiguous, and must be interpreted to favor the insured. They argue that "sudden" should be defined as "unexpected," which would provide coverage for any release which the insured did not intend, know of or have reason to expect. Those representing insurance companies argue that the word "sudden" has a temporal meaning from which it cannot be divorced. Under this theory, gradual, continuing leaks cannot be squared with the temporal conception of the word "sudden."

#### A. *Pro-Insured Theories*

Early judicial interpretations of this issue tended to construe the exclusion in favor of the insured by interpreting the "sudden and accidental" clause to be a restatement of the term "occurrence." Under the rationale of these cases, if the discharge or damages were neither expected nor intended by the insured, the pollution exclusion clause will not bar coverage. For example, in 1975, the *Lansco* court faced a situation that it found to be "sudden and accidental" under this theory when vandals opened the valves on some of Lansco's retention tanks, causing oil to leak into a nearby river.<sup>63</sup> This contamination was "sudden" in that it occurred both quickly and unexpectedly. Further, it was clear that there had been no intent on the part of Lansco to pollute the river.<sup>64</sup> According to the New Jersey court, the definition of "sudden" included happening without previous notice or on very brief notice, unforeseen, unexpected, or unprepared. "Accidental" was defined as happening unexpectedly, by chance or taking place not according to a usual course. Despite the temporal component in the above definition of "sudden," the court concluded that since the oil spill was unexpected and unintended from the viewpoint of the insured, the "sudden and accidental" provision was triggered.<sup>65</sup>

Many modern courts have also construed the "sudden and accidental" clause in favor of the insured. For example, in *New Castle County v. Hartford Accident & Indemnity Co.*,<sup>66</sup> the disposal of solid waste in a

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63. *Lansco*, 350 A.2d 521, 524.

64. *Id.* at 524.

65. *Id.* Some courts have held that the "sudden and accidental" language applies to the results of the discharge rather than the release itself. See *Jackson Township Mun. Utils. Auth. v. Hartford Accident and Indem. Co.*, 451 A.2d 990, 994 (N.J. Super. Ct. Law Div. 1982). Although derived from case law in other states, this conclusion seems to contradict the clear language of the pollution exclusion clause. It is difficult to reach the conclusion that "sudden and accidental" applies to the *results* and not the *release* itself since the language of the pollution exclusion clause states that the exclusion does not apply "if such discharge, dispersal, release or escape is sudden and accidental."

66. *New Castle County v. Hartford Accident & Indem. Co.*, Nos. 89-3814, 90-3012, 90-3030 (3rd Cir. 1991), 673 F. Supp. 1359 (D. Del. 1987).

county-operated landfill from 1969 until 1971 resulted in contamination of the local drinking water supply. In applying Delaware law, the Third Circuit Court of Appeals found that the phrase "sudden and accidental" was ambiguous and therefore interpreted the term in favor of the insured to mean "unexpected and unintended."<sup>67</sup> Other recent federal and state courts have also followed this trend.<sup>68</sup> However, several recent court decisions, while interpreting sudden and accidental to mean unexpected or unintended, have denied coverage where the parties have intentionally disposed of hazardous waste as a regular course of business.<sup>69</sup> Under such circumstances, these courts have held that the damages are not unexpected or unintended from the viewpoint of the insured.

Although parties still occasionally assert that the term "sudden" relates to the results of the discharge,<sup>70</sup> more recent decisions simply interpret the ambiguity of "sudden" as it relates to the release of pollutants. An example of this occurred in *Claussen v. Aetna Casualty and Surety Co.*,<sup>71</sup> where, between 1971 and 1985, land surrounding the Picketville Superfund Site was contaminated by seepage from a landfill. In construing the pollution exclusion clause within the policy, the Georgia Southern District Court ruled that the language was unambiguous and coverage did not provide for gradual pollution. On certification from the Eleventh Circuit Court of Appeals, the Georgia Supreme Court replied that "sudden" has a variety of meanings ranging from "unexpected" to "abrupt." Noting that Georgia courts require ambiguities in insurance contracts to be construed in a light favorable to the insured, the court held that "sudden and accidental" must be interpreted to exclude a temporal element.<sup>72</sup>

Some courts have used the drafting history behind the pollution exclusion clause in a typical CGL policy to find in favor of the insured. For example, under the so-called "modern view" of contract interpretation under Delaware law, the Delaware courts have held that extrinsic evidence in the form of the drafting history of the language in a CGL policy

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67. *Id.*; see also *Hybrid Equip. Corp. v. Sphere Drake Ins. Co.*, C.A. No. 14597, 1991 Ohio App. LEXIS 362 (Ohio Ct. App. January 30, 1991).

68. See *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083 (Colo. 1991).

69. See *Lumbermen's Mut. Casualty Co. v. Belleville Indus.*, 938 F.2d 1423, 1427-28 (1st Cir. 1991) (coverage denied where party continually discharged PCBs into nearby river as a regular course of business for a lengthy period of time); *Hartford Accident & Indem. Corp. v. United States Fidelity & Guar. Co.*, 765 F. Supp. 677 (D. Utah 1991) (damages not "sudden and accidental" where the dumping of PCBs into dirt pits for 15 years was a continuous and deliberate business practice).

70. See *supra* note 65.

71. 888 F.2d 747, 750 (11th Cir. 1989).

72. *Id.* at 748; see also *New York v. Aetna Casualty and Sur. Co.*, 547 N.Y.S.2d 452 (N.Y. App. Div. 1989); *Time Oil Co. v. CIGNA Property & Casualty Ins. Co.*, 743 F. Supp. 1400, 1408 (W.D. Wash. 1990). The *Claussen* court specifically rejected the reasoning of *Jackson Township*, 451 A.2d 990 (N.J. Super. Ct. Law Div. 1982) however, by commenting that there is a clear distinction between focusing on results and focusing on discharges.

is admissible to determine the meaning of terms within such policies.<sup>73</sup> A court is likely to review such drafting history if it finds that the terms within the CGL policy are ambiguous, despite the fact that CGL policies typically consist of standard insurance forms which are not the result of negotiations between the insurer and the insured. The drafting history behind the pollution exclusion clause suggests that when the clause was added in 1970, it was not intended to protect against coverage for pollution which did not occur suddenly in a temporal sense. Rather, the addition of the clause was intended to further preclude coverage for intentional pollution.<sup>74</sup> Therefore, insureds often advocate use of the drafting history behind the pollution exclusion clause to reach a conclusion that "sudden and accidental" is equivalent to unexpected or unintended from the viewpoint of the insured.

### B. *Decisions Favoring Insurers*

A substantial number of courts have taken contrary positions, finding that a particular release does not fit under the "sudden and accidental" clause. One of the earliest of these cases, *City of Milwaukee v. Allied Smelting Corp.*,<sup>75</sup> involved acidic discharges into a city sewage system over a period of three years. In *Allied Smelting*, the Wisconsin Court of Appeals agreed that any ambiguities must be construed against the insurance company, but noted that three additional rules of interpretation apply. First, the objective of any construction must be to determine and carry out the intentions of the parties. Second, to determine the parties' intent, a practical construction is most persuasive. Finally, and perhaps most importantly, no insurance contract should be rewritten in a way that would bind an insurer to a risk that was not contemplated and for which a premium was not paid.<sup>76</sup> The court then examined the meaning of the phrase "sudden and accidental" and held that since coverage is generally limited to injuries stemming from a "sudden and identifiable event with respect to both location and time,"<sup>77</sup> long-term damage and gradual pollution would not be covered.<sup>78</sup>

Other courts have suggested additional interpretations when finding in favor of insurance companies. For example, the North Carolina Supreme Court in *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*<sup>79</sup> held that gradual pollution is excluded under the CGL policy, because when read in context of the entire exclusion, the "sudden and

73. Cf. *E.I. DuPont De Nemours & Co. v. Admiral Ins. Co.*, No. 89C-AU-99, 1991 Del. Super. LEXIS 416 (Del. Super. Ct. Oct. 22, 1991).

74. Donald V. Jernberg, Note, *The Role of Drafting History In Environmental Coverage Litigation*, 4-3 TOXICS L. REP. 78, 81 (1989).

75. 344 N.W.2d 523 (Wis. Ct. App. 1983), *overruled by* *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1990).

76. *Id.* at 525-26.

77. *Id.* at 527.

78. *Id.*

79. 340 S.E.2d 374 (N.C. 1986).



accidental" clause "describes the event—not only in terms of its being unexpected, but in terms of its happening instantaneously or precipitantly."<sup>80</sup> In addition, the *Waste Management* court was concerned that allowing coverage merely for unexpected pollution would encourage insureds to be ignorant about potential releases and the results of the pollution.<sup>81</sup> Given the enormous potential liability in pollution claims, the court felt that financial responsibility should be placed on the insured, the party best able to prevent the initial contamination.<sup>82</sup>

Recently, a number of courts have followed this temporal interpretation of the "sudden and accidental" clause by rejecting coverage for gradual pollution claims on the basis that "sudden and accidental" simply cannot be read in context without a time element.<sup>83</sup> In *FL Aerospace v. Aetna Casualty and Surety Co.*,<sup>84</sup> a recent case decided under Michigan law, the Sixth Circuit Court of Appeals endorsed this line of reasoning. In *Aerospace*, the Sixth Circuit refused to hold that pollution which occurred over a thirteen year period was within the "sudden and accidental" exception to the pollution exclusion clause. In finding the words unambiguous, the court stated, "'sudden' has a plain, everyday temporal component" and must be interpreted in that light.<sup>85</sup>

In some instances, additional questions surround the pollution exclusion clause. For example, the decision of a court may turn on the meaning of the term "accidental." Although the intentional dumping of pollutants into a site will usually not be covered,<sup>86</sup> the outcome is not so clear if waste is intentionally disposed in a site but then migrates to another site causing the pollution at issue. In this situation, there will be an "occurrence" to trigger coverage if the pollution is unintended and unexpected and, in some courts, the gradual leakage can be considered "sudden." However, courts have almost uniformly refused to override the pollution exclusion clause when the discharges have been part of the reg-

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80. *Id.* at 382; see also *Ogden Corp. v. Travelers Indem. Co.*, 924 F.2d 39 (2d Cir. 1991) (under New York law, a sudden discharge must occur over a short period of time); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 570 N.E.2d 1154 (Ill. App. Ct. 1991) (discharges of PCBs into adjacent waterway over an 11 year period are not "sudden and accidental").

81. *Waste Management*, 340 S.E.2d at 381 (policy argument for keeping insured vigilant).

82. *Id.*

83. See *Industrial Indem. Ins. Co. v. Crown Auto Dealerships, Inc.*, 731 F. Supp. 1517 (M.D. Fla. 1990) (pollution was clearly cumulative and cannot be classified as abrupt or sudden); *C.L. Hawthaway & Sons Corp. v. American Motorists Ins. Co.*, 712 F. Supp. 265 (D. Mass. 1989) (It "offends common sense" to describe a gradual leak as sudden. The opinions of the Massachusetts Supreme Court use "gradual" and "sudden" as opposites.); *Fireman's Fund Ins. Co. v. Ex-Cell-o Corp.*, 702 F. Supp. 1317 (E.D. Mich. 1988) (to read "sudden" as meaning only "unexpected" is to render the definition of "accidental" mere surplusage).

84. 897 F.2d 214 (6th Cir. 1990).

85. *Id.* at 219.

86. See, e.g., *Technicon Elec. Corp. v. American Home Assurance Co.*, 542 N.E.2d 1048 (N.Y. 1989).

ular course and operations of the insured's regular business activity.<sup>87</sup>

## V. SUGGESTED APPROACHES FOR DETERMINING COVERAGE

The discussion of the issues above illustrates the difficulties involved in interpreting insurance contracts in the context of response cost claims under CERCLA. The primary problem in this area is that state and federal courts apply the law of the state with the most significant interest. Under this approach, coverage under a CGL policy for environmentally related costs has become a question of contract interpretation under state law, which has led to a wide range of divergent opinions.

However, this issue should not be divorced from the primary policy considerations of CERCLA. Congress promulgated the Superfund Act in 1980 to establish a broad, comprehensive scheme under which responsible parties would be jointly and severally liable for environmental damages covered by the statute. In the decade since CERCLA's enactment, this expanded liability for environmental damages has embroiled unsuspecting business and land owners in investigative and cleanup claims regarding the effects of substances that they never foresaw. In certain instances, parties should be held responsible for their actions, including when they intentionally discharge or dispose of hazardous substances. However, persons who had engaged in operations which were legally appropriate at one time and were not considered harmful to the environment under applicable laws, are now also liable for an expanded scope of releases of allegedly harmful materials. When interpreting insurance contracts in such instances, the courts should consider the policies behind CERCLA, as well as the general purposes of insurance within American business.

The courts should seek to strike a balance between the competing concerns of the insurance industry, and the public policy goals of federal and state Superfund laws (meant to ensure that adequate monies are available to clean up the nation's hazardous waste sites). In doing so, courts should interpret the terms of CGL policies according to the factual circumstances of each case, keeping in mind that the purpose of insurance is to protect insureds from unexpected and often unpreventable liabilities. Despite the fact that neither insureds nor insurers are able to foresee the types of liability created under CERCLA, the CGL policy, by its broad terms, should require insurance companies to assume the liabilities imposed by the Superfund Act, unless applicable contractual terms specifically negate such liabilities.

### A. *An Objective View of "Occurrence"*

In light of the discussion above, the meaning of the term "occurrence," should be the starting point for interpreting the terms of a CGL policy.

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87. See *Industrial Indem.* at 1520-21; *Great Lakes Container v. National Union Fire Ins.*, 727 F.2d 30 (1st Cir. 1984) (New Hampshire).

Under a CGL policy, a court should find an "occurrence" when the *damage* resulting from the involved conduct is neither "expected" nor "intended" by the insured. In many situations, parties have found themselves liable for actions that, while totally legitimate under applicable laws at the time, now result in unprecedented liability under CERCLA. It would be unfair to hold such parties liable for actions or courses of conduct which, while intentional, were legitimate under applicable laws.

Further, to reach an equitable result, the meaning of "expected or intended" should focus on whether the harm is "reasonably foreseeable" from the standpoint of the insured. Additionally, courts should utilize the continuous or multiple trigger approach to determine whether an "occurrence" has taken place during the policy period. This approach best suits the factual situations in most environmental cases, which involve damages resulting from gradual releases occurring over long time periods. Under the continuous trigger approach, an insured may assert claims for damages due to the *release(s)* which should, in reality, be treated as a single, continuous event. Applying these standards would provide a fair and adequate basis to determine whether an insurance company should be responsible for damages caused by the conduct (either intentional or unintentional) of the insured.

#### B. *CERCLA Response Costs - Should They Be Covered?*

A more important issue involves interpreting whether response costs incurred under CERCLA are "damages" within the scope of the CGL policy. The artificial distinction between a complaint seeking injunctive relief and a claim explicitly asserting legal "damages" should be eliminated. Those courts that adopt a narrow, technical definition of "damages" under state contract law apply unsubstantiated reasoning which ignores the cleanup policies underlying CERCLA. First, damages to the environment constitute "property damage" under the terms of a typical CGL policy, regardless of whether such a decision focuses on the "detriment" to governmental or private interests (i.e., out-of-pocket losses) or on the actual damage to land, trees, air, or water. Second, the potential classification of CERCLA response costs as damages under a CGL policy is an ambiguity that should be construed in favor of the insured.<sup>88</sup> Injunctive relief and response costs under CERCLA fall within the scope of the CGL policy's definition of damages as amounts which the insured is "legally obligated to pay." Likewise, these costs meet the common dictionary meaning of damages, since the insured is paying, in effect, compensation to the government for loss or detriment to governmental interests (i.e., the environment) caused by the acts of the insured.

Another relevant inquiry in interpreting this issue is the reasonable expectations of the parties. CGL policies are usually in standard form.

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88. As held by the California Supreme Court in the *AIU Insurance Co. case*. *AIU Ins. Co. v. Superior Court of Santa Clara County*, 799 P.2d 1253 (Cal. 1990).

"Negotiations" between the parties generally should have no bearing on the interpretation of the contract. However, the court should consider the broad environmental policy of CERCLA and recognize that, while CERCLA damages might not have been contemplated when an insurance contract was formed, the insured would have reasonably expected the possible risk of court-made or legislative liabilities to be covered under the relevant policy. Additionally, a finding which covers such liabilities serves the purpose of insurance policies because the court provides coverage to the insureds for unsuspected liabilities.

The outcome may vary in cases where the EPA claims causes of action involving injunctive measures aimed solely at preventive relief. For example, where a complaint seeks injunctive relief or where insureds have entered into consent decrees regarding the investigation of a site, courts should focus on whether actual hazardous waste contamination, including the contamination of surface water and groundwater, has taken place. If an injunction only requires the insured to take *preventative* measures, a court should not find coverage under an applicable CGL policy because there has been no "property damage." An example of such a situation would involve a Superfund cleanup order based on the potential *threat* of release of hazardous substances. Such a narrow interpretation should be limited solely to a situation involving injunctive claims where no property damage has yet occurred. However, where property damage has occurred, courts should find that response costs are covered for measures to clean up contamination *and* to prevent the further spread of contamination. Under CERCLA, a sufficient site cleanup means removing hazardous substances and taking measures to prevent future releases of the involved substances. All of these "cleanup" costs should be included as reasonable measures of "damages" under the terms of the CGL policy.

#### VI. "SUDDEN AND ACCIDENTAL" - MUST IT HAPPEN QUICKLY?

A similar balancing of interests should be conducted when a court interprets the meaning of the terms "sudden and accidental" in the pollution exclusion clause of CGL policies. Although courts should attempt to give effect to the broad policies of CERCLA, they must also interpret the language of a specific contract in light of the intent of the parties to the agreement. When parties enter into an insurance contract containing a pollution exclusion clause, they agree to limit, to some extent, the scope of coverage for liabilities caused by various types of "pollution." Therefore, courts should give appropriate deference to this intention of the parties.

However, the courts should also consider the insurer's intent behind the addition of the pollution exclusion clause to the CGL policy. This provision further protects insurers by eliminating the coverage for damages resulting from releases, which the insureds may have expected. Courts which have construed "sudden and accidental" to mean "unex-

pected" or "unintended" have appropriately interpreted the literal terms of the typical CGL policy. For example, intentional discharges of hazardous substances which have occurred as part of a continuous business practice of a company for a lengthy time period (i.e., over five years) should not be covered under a CGL policy. However, if the discharges are neither intentional nor continuous, but rather are sporadic, separate events occurring over a long period of time, the courts must closely analyze these factual circumstances to determine whether damages from specific events are covered. Such an approach will accommodate the broad policy implications of CERCLA, as well as the intent of the parties in the insurance agreement.

### CONCLUSION

The above proposed approach would result in a fair and equitable interpretation of insurance coverage of environmental liabilities under typical CGL policies. Such an analysis must involve a balancing of equities between the broad cleanup policies of CERCLA and the intentions of the contracting parties. Where insurance contracts do not include such limiting measures as pollution exclusion clauses, insurance companies will likely be responsible for those response costs incurred under CERCLA which fall within the scope of the CGL policy.

Several authorities have expressed concern that such a result will lead to a collapse of the insurance industry due to the extraordinary liabilities imposed by CERCLA. Insurance companies would be liable for a great deal of response costs incurred where pre-CERCLA insurance contracts do not contain limiting language. Yet, by assuming such environmental cleanup costs, the insurance industry would serve its function of accepting unexpected risks of the contracting parties. In the future, insurance companies may include limiting provisions (i.e., absolute pollution exclusion clauses) in their insurance policies and/or engage in the careful analysis and supervision of the operations of their insureds. These practices would involve such measures as regular environmental auditing of potential and actual insureds and other preventive investigative measures before entering into insurance contracts. By taking such measures, the insurance industry would engage in practices to adjust to the newly imposed environmental liabilities under CERCLA.

To protect appropriately the interests of all parties involved, the courts should take an approach in this area which accommodates the national public policies of CERCLA, and the contractual intentions of private parties. Considering the enormous costs of CERCLA hazardous waste cleanups to society and private parties, it is imperative that the courts consider the national goals behind CERCLA when ruling on coverage issues concerning CGL policies. In addition, the federal legislature should be responsible for adopting legislation necessary to protect the welfare of the insurance industry while it absorbs these significant liabilities. The coordination of this effort between Congress and the courts

would ensure the most cost efficient liability allocation under CERCLA and aid in the quick, efficient cleanup of the hazardous waste sites across the nation.

